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No. 152

In the Supreme Court of the United States

OCTOBER TERM, 1942

EVERIT B. TERHUNE ET AL., EXECUTORS, PETITIONERS

v.

WILLIAM M. WELCH, COLLECTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 37–43) is reported in 39 F. Supp. 430. The opinion of the Circuit Court of Appeals (R. 47–55) is reported in 126 F. (2d) 695.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 23, 1942. (R. 55–56.) The petition for a writ of certiorari was filed on June 16, 1942. The jurisdiction of this Court is predi-

cated upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created a trust in 1929, reserving the income to himself for life, and naming himself as one of the trustees. He also reserved the power to terminate or amend the trust in conjunction with the other trustees and some of the beneficiaries. Is the corpus of the trust includible in his gross estate under Section 302 (d) of the Revenue Act of 1926?

STATUTES AND OTHER MATERIAL INVOLVED

The statutes, regulations, and committee report involved appear in the Appendix, *infra*, pp. 7–13.

STATEMENT

This is an action for the recovery of an alleged overpayment of estate tax upon the estate of William L. Terhune, who died on February 23, 1936. The alleged overpayment was made pursuant to a determination by the Commissioner of Internal Revenue that the assets of a trust created by the decedent on May 6, 1929, were includible in his gross estate (R. 1–23, 25–28).

The trust, which is evidenced by two indentures executed simultaneously on May 6, 1929 (R. 5, 13), was created by the decedent at a time when he was 79 years of age. Its corpus consisted of the principal portion of his property and it was

created in order to avoid possible friction between his children and a second wife whom he was then about to marry. The named trustees were the grantor, his son, and his son-in-law (R. 37, 38).

The net income of the trust was payable to the decedent during his life; after his death, the income and corpus were to be distributed among his descendants and his second wife in accordance with provisions which are set forth in detail in the trust instruments, but do not appear to be material here (R. 14–17).

The indentures provided that during his lifetime the decedent should be the active trustee with complete power to manage the trust by himself (R. 8, 20). It was also provided that he could delegate his active authority to any of the other trustees (R. 9, 21), and that he could appoint a fourth trustee at any time after June 10, 1929 (R. 11, 22). Both indentures contained the following critical provision (R. 10, 21):

> 12. This Trust may be terminated or amended at any time, but only with the written consent of the three Trustees herein named, and of any Trustee appointed by William L. Terhune under clause 14 hereof, or the survivors or survivor of them, and of the then surviving children of the said William L. Terhune.

The Commissioner ruled that the corpus of the trust was includible in the decedent's gross estate and determined a deficiency accordingly (R. 25–

28). The decedent's executors paid the deficiency and then brought this suit for refund. The District Court held that the corpus of the trust was not includible in the decedent's gross estate and entered judgment for the plaintiffs in the amount of $57,669.53 plus interest thereon (R. 36). The Circuit Court of Appeals reversed, holding that Section 302 (d) of the Revenue Act of 1926 required the trust to be included in the gross estate (R. 55–56).

ARGUMENT

The decision below is correct. There is neither a conflict, nor any other reason warranting further review.

Section 302 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (Appendix, *infra,* p. 7), requires the inclusion in a decedent's gross estate of the corpus of a trust created by him if the enjoyment thereof "* * * was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *."[1] Since the grantor in this case named himself one of the trustees, he had reserved the right under paragraph 12, quoted above, to terminate *or amend* the trust in conjunction with the

[1] At the time of the decedent's death, February 23, 1936, this section had been amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680, Appendix, *infra*, p. 7, but not in any respect here material.

others mentioned therein. The corpus must therefore be included in his gross estate, notwithstanding that the other persons were beneficiaries or had an interest in the trust. *Helvering* v. *City Bank Co.*, 296 U. S. 85. There is no foundation for petitioners' contention that the powers to terminate or amend were of a fiduciary nature and therefore not within the statute. Cf. *Reinecke* v. *Smith*, 289 U. S. 172, 176–177.

There is no conflict with *Helvering* v. *Helmholz*, 296 U. S. 93, in which the Court held the predecessor provisions of Section 302 (d) in the Revenue Act of 1924 unconstitutional as applied to a trust created prior to their enactment. On the same day, the Court held those provisions valid in the *City Bank* case, *supra*, as applied to a trust established after they became law. And as in the *City Bank* case, the trust herein was created after the enactment of the critical provisions of the revenue act.

It is of no significance that the grantor's powers to terminate or amend were reserved to him "as trustee" rather than "as grantor." The statute draws no such fine distinction, and a clarifying amendment made by Section 805 of the Revenue Act of 1936 (Appendix, *infra*, p. 9) makes clear that the power is within the statute "in whatever capacity exercisable." [2]

[2] The amendment was occasioned by *White* v. *Poor*, 296 U. S. 98, in which the existing provisions were held inapplicable to a case where the grantor's power relied upon by the

CONCLUSION

There is no conflict with any decision of this Court or any other court. The decision below is correct. The petition should be denied.

Respectfully submitted.

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Government had not been reserved but had been bestowed upon her after the trust had been created. To the extent that the 1936 amendment deals with powers *retained* by the grantor in whatever capacity exercisable, it is merely declaratory of existing law. See Article 20, Treasury Regulations 80 (1937 Ed.); cf. H. Rep. No. 2818, 74th Cong., 2d Sess., pp. 9–10 (Appendix, *infra*, pp. 11–13).